IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

JEWELL C. BEASLEY, Petitioner-Appellant, v. LAWRENCE E. WILSON, Warden, California State Prison, San Quentin, California, Respondent-Appellee.	)	No. 20857

BRIEF OF APPELLEE

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BRIEF OF APPELLEE

JURISDICTION

The jurisdiction of the United States District Court to entertain appellant's petition for a writ of habeas corpus is conferred by Title 28 United States Code section 2253, which makes a final order in a habeas corpus proceeding reviewable in the Court of Appeals when a certificate of probable cause has issued.

STATEMENT OF THE CASE

A. Proceedings in the state courts.

Appellant, Jewell C. Beasley, was convicted upon his plea of guilty in the Superior Court of San Diego County of robbery in the first degree and on July 13, 1949, was sentenced to the state prison for the time prescribed by law.

No appeal was taken from this judgment of conviction.

An application for a writ of habeas corpus was denied by the California Supreme Court on July 7, 1965.

B. Proceedings in the federal courts.

On August 5, 1965, sixteen years after his conviction, appellant filed an application for a writ of habeas corpus in the United States District Court, Northern District of California, Southern Division. On that same date, an Order to Show Cause was issued. Appellee, respondent below, filed a Return to the Order to Show Cause on August 25, 1965. Appellant filed a Traverse to the Return to Order to Show Cause on September 3, 1965. On October 27, 1965, the District Court appointed counsel to represent appellant in further proceedings before the court.

The District Court thereafter ordered that an evidentiary hearing be held and the hearing was conducted before the District Court on November 8, 1965 and January 5, 1966. Thereafter, additional points and authorities were filed by the respective parties.

On February 7, 1966, the District Court denied the petition for writ of habeas corpus, discharged the Order to Show Cause and dismissed the proceedings. The District Court concluded that appellant's plea of guilty was not the product of coercion but rather the result of a considered choice as he had previously been identified by the robbery victim as the perpetrator and had been further implicated

by his codefendant. The court also determined that petitioner's claim that he made certain incriminating statements prior to being advised of his constitutional rights was foreclosed since the United States Supreme Court's ruling in Escobedo v. Illinois, 378 U.S. 478 (1964) could not be retrospectively applied. Finally, the court concluded that appellant was advised of his right to counsel during the proceedings against him in the courts of the State of California and that appellant knowingly and intelligently waived that right.

On February 25, 1966 a certificate of probable cause was issued by the Honorable Albert C. Wollenberg, Judge of the United States District Court for the Northern District of California, Southern Division. On March 2, 1966, a notice of appeal was filed.

STATEMENT OF FACTS

A felony complaint charging appellant with robbery was filed in the Municipal Court of the San Diego Judicial District on June 1, 1949. On June 3, 1949, appellant was arraigned on the complaint and was advised of his rights. Appellant was arraigned on the complaint and at that time the court advised appellant of his right to be represented by a lawyer at all stages of the proceedings. Appellant affirmatively stated he did not wish to be represented by counsel. Appellant was released on bail a few days after his arrest and remained at large until the day of his sentencing,

July 14, 1949.

On June 21, 1949, appellant appeared before the Superior Court of San Diego County for arraignment on the information filed subsequent to the proceedings in the Municipal Court. The reporter's notes of the proceedings in Superior Court were destroyed after ten years (Govt. Code § 69955). At that time the trial judge informed appellant of his right to be represented by counsel. Judge William A. Glenn of the San Diego Superior Court presided at the arraignment and sentence of appellant and testified as to his customary practice and procedure which he followed at that time. It was established by Judge Glenn that it was his invariable practice to advise a defendant appearing in a criminal case that he was entitled to be represented by an attorney at all stages of the proceedings, that if the defendant was without funds and wished the assistance of counsel the court would appoint an attorney to serve without charge. The defendant was given a copy of the information and a transcript of the proceedings held at the preliminary hearing and was advised that he could have witnesses summoned in his behalf and that he could confront and cross-examine the witnesses called by the State. The judge carefully interrogated every defendant to determine that the defendant knew of his right to counsel and that the defendant was making a knowing and intelligent waiver of his right to counsel and that he determined this from all the circumstances

including the defendant's attitude, demeanor and apparent understanding of his explanation. If the defendant indicated that he wished to proceed without counsel and enter a plea of guilty Judge Glenn then informed the defendant of the consequences of such a plea. In this case, Judge Glenn stated that he would specifically inform the appellant Beasley that the crime of robbery was punishable in the state prison for a term of five years to life. Furthermore, at this time Judge Glenn had before him and had reviewed the transcript of the preliminary hearing when appellant had admitted his participation in the robbery. Judge Glenn thereafter accepted appellant's plea of guilty. The appellant again appeared before the trial court a few weeks later on July 13, 1949 for sentencing. After having read and considered the probation report the court denied appellant's application for bail and asked appellant why he had committed the crime. Appellant replied that it was because of his drinking. The court then asked appellant if he had any legal cause to show why judgment should not be pronounced against him. The appellant answered, "No, sir."

SUMMARY OF APPELLEE'S ARGUMENT

Since the appellant in his brief on appeal has abandoned his trial court claims that his judgment of conviction was the result of a coerced plea of guilty and also his claim that his conviction was the result of illegally obtained statements, appellee will confine

his argument to appellant's sole remaining contention, that is, that he was deprived of his right to counsel in the state court proceedings.

I

APPELLANT KNOWINGLY AND INTELLIGENTLY WAIVED HIS CONSTITUTIONAL RIGHT TO COUNSEL

The classic definition of the test to be applied in determining whether an effective waiver of a constitutional right has occurred is contained in Johnson v. Zerbst, 304 U.S. 458 (1938). A waiver is ordinarily an intentional relinquishment or abandonment of a known right or privilege. This determination of whether there has been an intelligent waiver of the right to counsel must depend, in each case, upon the particular facts and circumstances surrounding that case, including the background, experience and conduct of the accused. The application of this flexible standard was recently reaffirmed by this Court in Wilson v. Harris, 351 F.2d 840 (9th Cir. 1965).

The following factors relevant to determining the issue of competent waiver were established in the District Court:

Appellant was a literate adult twenty-one years of age at the time of his conviction. He was gainfully employed as a painter at a salary of about $76 a week. He was released on bail shortly after his arrest and

remained on bail throughout the various proceedings until the day sentence was imposed.

On June 3, 1949, when initially brought into court for arraignment on the complaint charging him with robbery appellant was informed of his right to be represented by counsel at all stages of the proceedings. Appellant affirmatively stated that he did not wish to be represented by counsel. Appellant thereafter testified and, while admitting his participation in the robbery, he attempted to place the primary culpability on his companion, Sgt. Wheatley. Thus, the evidence clearly supports the finding of Municipal Judge Phillip Smith of the San Diego Municipal Court that the appellant was aware of his right to legal representation and knowingly and intelligently waived that right at the preliminary hearing.

Thereafter on June 21, 1949, appellant appeared for arraignment in the San Diego Superior Court before Judge William Glenn. Since the transcript of this fifteen-year-old proceeding had been destroyed, Judge Glenn testified as to his practice and procedure at that time. The trial Judge's testimony established that upon his arraignment in Superior Court, a defendant was given a copy of the information and the preliminary hearing transcript; was advised that he could have witnesses summoned in his behalf and that he could confront and cross-examine witnesses called by the state; was advised that he was

entitled to be represented by an attorney at all stages of the proceedings and that if the defendant was without funds and wished the assistance of counsel the court would appoint an attorney. It was established by Judge Glenn that he carefully interrogated every defendant to determine whether or not he was making an knowing and intelligent waiver of his right to counsel. If the defendant indicated he did not desire counsel and wished to plead guilty, Judge Glenn informed him of the consequences of such a plea, that is, that he would have specifically informed the appellant that the crime of robbery was punishable in the state prison for a term of five years to life. At the time of accepting the plea, Judge Glenn had before him and had reviewed the transcript of the preliminary hearing wherein appellant admitted his participation in the robbery.

Examination of the above particular facts and circumstances surrounding appellant's entry of a guilty plea compels the determination that appellant intentionally relinquished the right to counsel, which right was known to him at the time of his plea.

Appellant is attacking the validity of a conviction based upon his plea of guilty entered in the San Diego County Superior Court over sixteen years ago. A judgment of conviction based upon such a plea of guilty is not likely to be set aside. See Johnson v. Zerbst, supra at 468. In

attacking his conviction on the basis of denial of his constitutional right to counsel, appellant has the burden of proving such denial by a preponderance of the evidence. See Johnson v. Zerbst, supra at 468-69; Moore v. Michigan, 355 U.S. 155, 161 (1957); Watts v. United States, 273 F.2d 10, 11-12 (9th Cir. 1959), cert. denied, 362 U.S. 982 (1960). It must not be forgotten that the official state record here indicates that appellant was duly arraigned in the Superior Court. In properly arraigning appellant, the Superior Court, being bound to follow the law of this state, California Penal Code section 987, necessarily determined that appellant competently, knowingly and intelligently waived counsel.

Two state court judges found in court proceedings sixteen years ago that appellant then competently waived his right to counsel. Judge Glenn was in a position to observe appellant and to evaluate his responses. Certainly, "the demeanor, the facial expression and the responses made by the accused soon may convincingly disclose to an experienced trial judge whether the accused is intelligently and understandingly waiving his constitutional right." Davis v. United States, 123 F.Supp. 407, 412 (D.Minn. 1954), aff'd., 226 F.2d 834 (8th Cir. 1955), cert. denied, 351 U.S. 912 (1956). Appellant attempts to attack the sufficiency of the inquiry made by the state court concerning the possible defenses he might have to charges brought against him.

But there is no such constitutional formula which must be followed by a state trial judge in order to determine whether a criminal defendant has completely waived his right to counsel. See United States v. Lester, 247 F.2d 496, 499 (2d Cir. 1957). Von Moltke v. Gillies, 332 U.S. 708 (1947), which is cited by appellant for this proposition, imposes no such checklist of inquiry on state courts.

The type of judicial inquiry which Mr. Justice Black outlined in Von Moltke as necessary for a valid waiver of counsel was subscribed to by only four justices of the Court. Of course, "lack of agreement by a majority of the Court on the principles of law involved prevents it from being an authoritative determination for other cases." See United States v. Pink, 315 U.S. 203, 216 (1942). Moreover, the requisites discussed in Von Moltke have not, to appellee's knowledge, been adopted by either the United States Supreme Court or any Court of Appeals as an absolute constitutional standard against which any alleged waiver of counsel must be measured. See, e.g., Twining v. United States, 321 F.2d 432, 434-35 (5th Cir. 1963).

Significantly, Von Moltke involved a federal conviction to which Rule 11 of the Federal Rules of Criminal Procedure applied. Thus, Mr. Justice Black spoke of "the solemn duty of a federal judge." 332 U.S. at 722. And the Courts of Appeal apparently have understood the requirements discussed in Von Moltke to be inspired by Rule 11 and thus

limited to federal cases. See, e.g., United States v. Lester, 247 F.2d 496, 499-500 (2d Cir. 1957); Aiken v. United States, 296 F.2d 604, 606-07 (4th Cir. 1961); United States v. Smith, 337 F.2d 49, 55 (4th Cir. 1964); United States v. Diggs, 304 F.2d 929, 930 (6th Cir. 1962); Shelton v. United States, 242 F.2d 101, 112 (5th Cir. 1957).

Even though the standards discussed in Von Moltke may in fact furnish "certain guidelines for the District Courts," even in these courts "the ultimate issue is simply whether the accused knowingly and intelligently chose to waive counsel." United States v. Smith, supra at 55.

The trial judge in appellant's case advised him of his rights including the right to court-appointed counsel, inquired of his desire for counsel, and informed him of the nature of the charge and the punishment prescribed for the offense. Further the trial court as a result of being familiar with the transcript of the preliminary hearing was aware of the appellant's version of what had occurred and the circumstances in mitigation of the offense. With all of these facts before him and upon his observance of the appellant's answers and demeanor the judge concluded that appellant competently waived counsel. Thus, it would appear that the trial court's action was in essential compliance with the formula set forth in Von Moltke. Assuming that the formula described in Von Moltke was not followed in every last detail, such fact does not vitiate the determination

of waiver and render the proceedings unconstitutional. See Aiken v. United States, supra at 606-07; accord, Shelton v. United States, supra at 112; United States v. Lester, supra at 499.

Appellant did not indicate a desire for counsel and in fact distinctly declared his desire to proceed without counsel. The Constitution does not require that in criminal proceedings the services of an attorney be forced upon a defendant against his wishes. Von Moltke v. Gillies, 332 U.S. 708, 724 (1948); Johnson v. United States, 318 F.2d 855, 856 (8th Cir. 1963); United States v. Redfield, 197 F.Supp. 559 (D.Nev. 1961), aff'd per curiam, opinion adopted, 295 F.2d 249 (9th Cir. 1961), cert. denied, 369 U.S. 803 (1962).

None of the compelling circumstances present in cases relied upon by appellant in his brief are present here. In the instant case, appellant was fully aware of the fact that he was entitled to counsel including court-appointed counsel. Here, appellant was not held in jail during the proceedings but rather was free on bail. Likewise appellant was aware of the consequences of rejecting legal advice and entering a plea of guilty, including the precise sentencing consequences. Appellant was truly informed of his rights and the nature of the charge against him and the evidence indicates his clear and consistent desire to plead guilty. There is nothing in the record to indicate appellant

was falsely advised, offered any inducement or coerced. On the contrary, he made his desire emphatically clear to the courts, to which he also indicated his guilt of the crime charged.

Appellant was not denied his constitutional right to counsel by the state courts, nor was he compelled to enter a plea without the advice of counsel. His conviction rests, therefore, upon a plea of guilty freely and voluntarily entered after being fully advised by the state courts of his right to counsel including his right to court-appointed counsel. Thus a consideration of the surrounding facts and circumstances compels the conclusion that he intelligently and understandingly rejected the court's offer of counsel.

CONCLUSION

For the reasons stated above, it is respectfully submitted that the order of the District Court denying appellant's petition for a writ of habeas corpus should be affirmed.

Dated: September 21, 1966.

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of the State of California

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Deputy Attorney General

Attorneys for Respondent-Appellee

CERTIFICATE OF COUNSEL

I certify that in connection with the preparation of this brief, I have examined Rules 18 and 19 of the United States Court of Appeals for the Ninth Circuit and that in my opinion this brief is in full compliance with these rules.

Dated: San Francisco, California

September 21, 1966.

EDWARD P. O'BRIEN
Deputy Attorney General
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